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Only sections relating
to marginal strips
reproduced here

27 October 1989

CONSERVATION LAW REFORM BILL

REPORT TO THE PLANNING AND DEVELOPMENT SELECT COMMITTEE BY OFFICIALS OF THE DEPARTMENT OF CONSERVATION

1. INTRODUCTION

1.1 The Conservation Law Reform Bill gives effect to Government decisions to

- restructure conservation quangos
- revise management planning procedures for all land managed or administered by the Department of Conservation
- restructure fish and game responsibilities
- provide for the reservation of marginal strips on the disposal of land of the Crown and for their purposes and management
- amend the Conservation Act in respect of a number of administrative matters
- amend the National Parks Act in respect of leasing powers
- consequential amendments arising out of the creation of new quangos in respect of the Walkways Act, Marine Reserves Act, Wildlife Act, Reserves Act, Marine Mammals Protection Act, Wild Animal Control Act, the National Parks Act, the Fisheries Act and the Conservation Act.

1.2 A detailed outline of policy was supplied to the Select Committee in a briefing note on 12 September 1989. The Bill was introduced on 10 August 1989 and referred to the Planning and Development Select Committee which called for public submissions. Submissions closed on 8 September 1989 although a

number of late submissions have been accepted. 160 submissions together with number of supplementary submission were received and the Committee has held hearings on 13, 14, 19 and 26 September 1989 and 3, 10 and 17 October 1989. An analysis of submissions has been supplied to the Committee.

1.3 This report to the Committee shall be divided into the following parts

- interpretation
- conservation quangos
- management plans
- marginal strips
- fish and game
- amendments for Tourist Hotel Corporation in respect of National Parks Act
- amendments to the Conservation Act
- consequential amendments to other Acts
- any other matters.

Under each one of those headings there will be an identification of policy issues, an outline of issues raised by submissions, a response to those issues and proposals for changes which would be appropriate and a clause by clause analysis with proposals or recommendations for any changes.

1.4 Part I of the Bill amends the Conservation Act and includes the provisions relating to conservation quangos, management planning, marginal strips, fish and game, leases and licences and other amendments to the Conservation Act.

1.5 Clause 1 Gives the title of the Bill and provides for the dates on which it will come into force. Some amendments may be required in respect of Orders-in-Councils and bringing into force various parts of the Act in relation to conservation quangos and fish and game councils.

1.6 Clause 2 "Reads Part I of the Bill as for the Conservation Amendment Act 1987 and part of the Conservation Act 1987 - a machinery provision.

2. CLAUSE 3 - INTERPRETATION

2.1 This clause amends section 2 of the Principal Act by repealing and inserting new definitions.

Comments as follows;

amend - no change proposed

aquatic life - it was a suggestion that birds should be included. Birds are covered by the Wildlife Act 1953 and this definition is the same as the definition in the Fisheries Act - no change proposed

bed - the width of a river bed is the criterion which determines whether or not a marginal strip is reserved to the Crown (section 24(1)(c)). The boundary of the river bed establishes the inland or water boundary of the strip. Submissions identified and improved definition of river bed which more adequately encompasses the variety of river beds that exist in New Zealand and is easily understood by engineers, surveyors etc. It is

> "Bed" in relation to any river or stream, means the space of land which the waters of the river or stream cover from time to time at its fullest flow without over-topping its banks.

Conservation Board or Boards - no change proposed

conservation management plan - an amendment to this may be required to provide that for plans proposed in section 17FA of the Conservation Act or a management plan under section 48 of the National Parks Act 1980.

District Anglers Notice - no change proposed

Fishery - no change proposed

Fishery Officer - no change proposed

Fishing - no change proposed

Foreshore - lack of definition - It is currently defined in the Conservation Act. Submissions suggested an alternative definition of foreshore but the Department supports the retention of the existing definition which is compatible with existing legislation and enables the edge of the foreshore to be objectively determined

Freshwater Acclimatisation Societies sought amendment to the interpretation of "freshwater" in clause 2. The purpose of this interpretation is to define the outer limits of freshwater fish which are dealt with in the Bill and the inward or landward limit of marine fish dealt with in the Fisheries Act 1983. The interpretation does not confer any territorial role other than in respect of administration and management of fresh water fisheries. The basis for the interpretation is derived from section 2 Fisheries Act 1983 - interpretation of New Zealand waters, and regulation 2(3) of the Freshwater Fisheries Regulations 1983 which extends the application of those regulations in respect of acclimatised (sports) fish to the same 500 metre distance from the mouths of rivers and streams entering the sea as is provided in the Bill. Any definition which moves the freshwater boundary landwards would create administrative difficulties. It is not intended that the marine species (flounder, kahawai, cockles etc) found in areas described as freshwater be subject to the Bill. They remain under the Fisheries Act. No change is proposed.

Freshwater Fish - no change proposed

Freshwater Fisheries Management Plan - no change proposed

Game - no change proposed

Indigenous Fish - no change proposed

Marginal Strip - This is discussed in Part 5 of this report

National Fish and Game Council - In keeping with a suggested change to discontinue references the "regional" fish and game councils (see below) and to be consistent with the New Zealand Conservation Authority it is proposed to call this council the New Zealand Fish and Game Council. The National Executive submission pointed out that the definition should include the Transitional National (NZ) Council referred to in the proposed new section 26M. The Department agrees with this submission.

Nature Conservation A number of submissions raised the definition of "nature conservation". This definition and the functions in clause 6B 1(d) establish a special role for the Authority previously performed by the Nature Conservation Council. It is a widely accepted definition and was generally welcomed. However the Royal Forest and Bird Protection Society and the Nature Conservation Council both pointed out that it failed to include reference to landscape and landform that were included in the Nature Conservation Council Act. The Department agrees that the addition of landscape to the definition would be appropriate.

New Zealand Conservation Authority - add after "or conservation authority" the words "or authority"

Operational work plan - no change proposed

Permit - lack of definition A number of submissions (eg Federated Mountain Clubs) have suggested that a definition be included in the Bill for the word "permit" which is referred to in clause 8 (section 14) and also in clause 32 new section 64B. The Department sees little merit in providing such a definition as the word is understood in the common law. Use of the word in the Conservation Law Reform Bill and in the existing Conservation Act is intended to ensure the Minister can, when granting a permit under any legislation which empowers him to do so, impose conditions or charge necessary fees and costs.

Regional Fish And Game Council)
Regional Management Strategy)

Most Regional Government submissions and a number of private submissions pointed to the confusion caused by the name regional management strategy. The Department accepts that it may cause confusion with Regional Government and sees no problem if the Committee decided to recommend changes to fish and game councils and conservation management strategies.

Review - no change proposed

Sale - no change proposed

Sportsfish - no change proposed

Taking - no change proposed

Taupo Fishery - no change proposed

Walkway - no change proposed

In subclauses 3 and 4 consequential changes to delete the word "regional" will be required

2.2 Clause 4 The Department's functions in fisheries

The purpose in setting these functions out separately, rather than relying on the generality of the functions set out in the principal Act is to clarify roles in fisheries conservation. Freshwater fisheries conservation functions have been transferred from the Ministry of Agriculture and Fisheries to the Department of Conservation. Clause 4 of the Bill provides the legal separation of the functions. The regulatory role for freshwater for freshwater fisheries is separated from that for marine fisheries.

Some submissions question whether the Department's recreational fisheries protection function in clause 4 is exclusive, and thereby prevents fish and game councils from protecting sports fish. It is not in respect of sports fish. The term "recreational fisheries" used in clause 4 is wider than "sports fish" in respect of the Department's functions eg it extends to whitebait fishery. The need for the Department to have such a role has been acknowledged in the supplementary submission of the National Executive of Acclimatisation Societies.

5. MARGINAL STRIPS

5.1 Clause 15 of the Bill repeals section 24 of the Conservation Act and substitutes new sections 24, 24A, 24B, 24C, 24D, 24E, 24F, 24G, 24H and 24I of the Bill dealing with marginal strips. References are to the new sections.

Marginal strips are strips of land, generally 20 metres wide, around the coast, around lakes with an area greater than 8 hectares and along the banks of rivers and streams which have an average width of not less than 3 metres. At present they are created under section 24 of the Conservation Act when Crown land or State forest land adjacent to one of these bodies of water is transferred to a State Owned Enterprise.

5.3 The purpose of marginal strips is to maintain the natural values of the strips and adjacent waters and to provide public access to, and recreational use of, these waters. The marginal strip provisions contained within the Conservation Law Reform Bill are intended to better achieve these objectives at a much lower cost than the existing provisions.

5.4 Under the Bill, the Crown proposes to retain ownership of the strips although the strips will be included in the title of the adjoining land-holder. This is a departure from established land transfer practises. It will, however, result in a substantial saving of survey costs. Perhaps more importantly though, it enables the introduction of provisions that will result in strips moving when, through erosion, accretion, or avulsion, the shape of a foreshore changes or a river changes its course. This will ensure that strips will remain contiguous with the body of water they were created to protect. In the past, when strips were defined by surveys, geological processes sometimes resulted in strips separating from their water-course or body of water. The strips were, therefore, unable to provide protection of and access to the waterside.

5.5 Under the Bill, owners of land adjoining marginal strips will be able to manage the marginal strips. The use they make of strips must be compatible with the primary objectives of the strips. The Bill provides managers and the Crown with certain rights and obligations to ensure appropriate management of strips and to protect the rights of both parties. The Crown has the power to resume management of any strip whenever this action is considered necessary. Upon resumption of a strip the Crown will compensate the former manager for all approved improvements that are located on the strip. Subsequent sale or sub-division of land subject to marginal strip provisions will not effect the strips in any way.

5.6 The Bill will repeal section 58 of the Land Act 1948. It will bring strips created under that section, so called section 58 strips, under the Conservation Act and they will become known as marginal strips. Section 58 strips are reserved from sale or other disposition when Crown lands that adjoins: the coast, a lake with an area greater than 8 hectares or a rivers or streams which has an average width of not less than 3 metres, is transferred out of Crown ownership. The Bill removes unnecessary differences in legislation and management practices that currently exist for the two types of strip. It will not, however, effect strips known as esplanade reserves, which are created under the Local Government Act 1974.

5.7 The Bill includes provisions for the Minister of Conservation to dispose of a marginal strip provided such a disposal is in compliance with guide-lines included in the Bill.

5.8 The final major amendment relates to the categories of land covered by marginal strip provisions. Whereas the existing legislation relates to Crown land and State forest land only, the Bill includes provisions for strips to be created when any "land of the Crown" that includes an eligible water-course or body of water is transferred to a State Owned Enterprise or is otherwise disposed of.

5.9 The Committee has requested a guide to the provisions. Set out hereunder is a brief history of "the Queens Chain" and the current proposals.

5.10 History

Land Acts since 1892 have included provisions for land adjoining waterways (the coast, lakes, rivers and streams) to remain in Crown ownership when land adjacent to waterways was alienated from the Crown. Land Act provisions have focused on access. This is an important fundamental change.

The Conservation Law Reform Bill (CLR Bill) recognises the importance and often fragile nature of the land/water interface and the provisions of the Bill recognise environmental and conservation objectives as well as access.

There are thousands of kilometres of strips retained by the Crown. Coverage of the country is however by no means complete. This is because:

- direct transfer of land from Maori people to private ownership has occurred, ie some land has never been in Crown ownership;
- Land Acts have had provisions to waive the requirement for strips;
- erosion and movement of rivers has resulted in strips no longer being contiguous with the margins of a waterway and the waterway margins returning to private ownership;
- strip provisions have applied only to lakes greater than 8 ha in area and river greater than 3 m in average width.

5.11 Conservation Law Reform Bill Provisions

Location of these provisions within the Conservation Act 1987

Section 24 is located within Part IV - (Specially Protected Area) of the principal Act. Marginal strips do not have a highly protected status and the Department proposes that the new provisions should be placed under a separate Part IV A

5.12 Section 24 defines marginal strips

The NZ Law Society considered that the drafting of s 24(1) which reserves the strips to the Crown needs to be improved. The Department accepts that the committee may consider it appropriate to redraft this provision.

The NZ Law Society suggested that strips should apply to all Crown lands from the enactment of the conservation law reform rather than upon disposal of Crown lands. This is not the policy and no change is proposed.

Strips are created when land owned by the Crown is alienated (ie sold, leased etc) - section 24(1)(2).

Strips are of a fixed 20 metre width (except around hydro lakes) section 24(1)(2).

Many submissions recommend that the width of a marginal strip needs to be flexible and not set at 20 metres (as is proposed in the Bill). In some cases 20 metres is too great or too small to provide access and/or protection.

The Department acknowledges this. However, because the strips are created by a legal mechanism (ie Clause 15) rather than by survey definition, it is essential that they be of a fixed width. Without this there is no way of knowing where the in-land boundary of the strip is situated.

For hydro lakes the strip width is flexible but both boundaries of the strip are technical definitions.

Width of River bed - s.24(1)(c)

Strips are reserved to the Crown when Crown land adjacent to a stream or river with "an average width of 3 metres or more" is disposed of.

Surveyors have guidelines to enable them to make a decision on the average width of a river bed at any given section along the river. The difficulty that exists with Clause 15 is that strips will not be surveyed and the existence of a strip at any particular point may be unclear. The Department considers that there is a need for an administrative procedure to establish and map the location of marginal strips created under these provisions. This does not rquire an amendment to Bill.

Area of a Lake - s.24(1)(c)

A similar, situation exists regarding the size of lakes that attracts a marginal strip. This can be resolved in the manner suggested for rivers.

Submissions were received recommending that strips should start at the normal level of a lake rather than the proposal in the Bill that strip start at the maximum flood level. This is the situation that currently exists in the Conservation Act and the Department endorses this recommendation.

Width of Strip s.24(2)

<u>Concerns about ability of s.24(3) to Include Existing Strips and bring them under the Conservation Act</u>

The Public Land Coalition provided an example of strips that were re-designated in the past to avoid disposal.

The Department believes that the debate over what is or is not a strip should be separate from the legislative process. It believes s.24(3) is wide enough to include all existing lands that serve the purpose of strip. It should be made clear either in this section or sections 24C and 24D that strips under former Acts are not subject to the disposal provisions of the Bill. A clause similar to section 24F(7) is proposed.

<u>Exemption of Urban Land from Provisions of Clause 15-s.24(5), (7)</u>

The Government policy of exempting urban land was questioned in many submissions.

The provisions of Clause 15 are certainly less suitable in urban areas than s.289 of the Local Government Act. The disposal of lands of the Crown in urban areas would in many cases be followed by sub-division which would invoke s.289.

To ensure that the provisions of s.289 apply to disposals of the Crown's urban land it would be possible to deem the disposal of Crown lands in urban areas to be a sub-division for the purposes of s.289. The Department strongly recommends that this be done.

It is important to, that s.24(5) does not extinguish existing strips (Section 58 strips) in urban areas. A rewording seem necessary to ensure this.

Exemption of Land Administered by the Department of Conservation - s.24(5)

Section 24 of the Conservation Act created marginal strips on conservation land. The Bill does not create strips until Crown land is disposed of. The exemption for conservation land is therefore not necessary and should be deleted. A point of concern was the repeal of section 58 of the Land Act 1948 contained in the schedule of the Bill relating to strips on Crown pastoral land. A long running debate on whether the strips should be retained by the Crown when pastoral leases are issued was cited. It was argued that section 58 should be retained and that the dispute should be resolved under that legal framework.

The Department proposes that section 24(10) be amended to include the renewal and transfer of leases. This will go some way towards adressing the concerns raised.

Section 24A - Purposes of Marginal Strips

The question of whether access or protection is the primary purpose of marginal strips was raised in a number of submissions. The Department's view is that all are of equal importance and that no hieracy should be established.

Section 24B relates to registration of the reservation and disposal of strips.

Both Landcorp and the Institute of Surveyors believed that provisions were required to remove the marginal strips annotation from any particular title that was sufficiently distant from a waterway to ensure that a stream or river would never move sufficiently to enter the land covered by the title.

The Department believes that the problem is more perceived than real and no change is proposed.

Sections 24C and D Powers to declare land not a marginal strip and to dispose of strips.

These provisions were supported by SOE's and the West Coast mining interests. They were, however, extremely unpopular with conservation groups.

The Minister of Conservation proposes to introduce a Supplementary Order Paper to modify these provisions and to provide that the declaration of land not to be a marginal strip can be made only at the time when the land is alienated from the Crown. This would be a waiver rather than a disposal. It would mean that there would be no potential for disposing of existing strips (other than by exchange).

Exemption from Offer-back Provision of the Public Works Act - s.24D(5)

Some strips (eg around hydro lakes) will be located on land taken by the Crown under the Public Works Act.

This provision ensures that land no longer required for a marginal strip is offered first to the owner of adjoining land rather than to the owner of land at the time it was taken by the Crown under the Public Works Act. The provision will not be required if the proposed SOP has effect.

Section 24E was not opposed other than a suggestion to abolish all AMF rights. No change is proposed.

Section 24F - Mobility of Strips

This was loudly applauded in most submissions. The notable exception was the Institute of Surveyors (Landcorp agreed with mobility but only if the ownership was transfer to it with a marginal strip caveat to protect the public right of access).

The implication of a mobile strip is that no complete survey definition of the strip or the adjoining property can be prepared. The Surveyor's Institute believes this is a retrograde step which will undermine the land transfer system (the Torren's System). They believe the provisions will dramatically increase the work involved in future title searches and that actually location of a strip will be the source of numerous future conflicts. They also contend that the provision undermines existing principles relating to accretion, erosion and evulsion (the sudden movement of a river or stream).

The Department believes that Government intends that the movement of the strips should be constrained to land in Crown ownership at the time the Bill becomes law. An amendment to s.24F to ensure this is proposed.

Section 24G - Management of Strip

Existing marginal strips are often used on an informal basis by owners of adjoining land. Uses include grazing and access for stock to water.

The Bill proposes that uses compatible with the purposes of the strips be formalised. Along with this the rights and obligations of the user (manager) are formalised.

Most submissions acknowledged that although strips are important for conservation purposes and access, in many cases some productive (ie commercial) use is compatible with the purposes of strips eg informal grazing was considered acceptable. However the proposal to establish formal management rights of adjoining owners was strongly objected to in the submission from almost all conservation groups. The rights for the adjoining owner to grow and harvest trees was of particular concern to many who presented submissions.

The Department considers that productive use of strips is often compatible with the primary purposes of strip.

Section 24G must correctly set the balance between access and protection, and commercial use. Many submissions felt that the provisions in 24G placed the balance too strongly in favour of commercial use.

The following aspects of management were commonly raised:-

Appointment of Managers - s.24 G (1)(2)

S.24(1) says the Minister "shall" appoint a manager and s.24(2) entitles the adjoining owner to be manager.

Some submissions advanced a case for persons or agencies other than the owner of adjoining land to be appointed to manage a marginal strip. Suggestions included, regional councils, iwi authorities, fish and game councils. Other submissions suggested that the Department of Conservation retain management.

This was particularly emphasised in relation to existing marginal strips. Some existing strips are very wide eg 600m wide strips were established under Lands and Survey's, "Berm Policy" along parts of the Taieri River in Central Otago. These strips may better managed by an organisation such as a regional council than by adjoining owner. The Department that the Minister should have a discretion not to appoint a manager. If the Minister chooses to do so the management of the strip should be offered first to the owner of the adjoining land unless an alternative manager is required for some specific purpose.

Closure and restriction on Domestic Animals on Strips - s.24 G(5)(b)(c)

> Existing strips cannot be closed by owners of adjoining land. Existing strips are Crown land to which the public formally has no rights of access although in practise thought the public has had unrestricted access to existing strips.

The Bill provides for greater coverage of forest land than was captured by Section 58 of the Land Act 1948. Logging (risk to public safety), high fire risk (risk to assets) and containment of forest disease are considered to be reasons for temporary closure by forest managers.

Electricorp may need the power to close a strip when flooding of the strip is probable (risk to public safety).

The provisions for closure may require tightening to ensure managers do not close strips for frivolous reasons. The Department proposes that "operational or safety reasons" could be replaced with a phrase such as "operations creating public safety hazard, or demonstrable risk to the assets of the adjoining owner". This would exclude say lambing as a reason, per se, to close a strip or natural hazards being used as a reason to close a strip. Lambing and s.58 strips with public access have co-existed in the past. A similar approach is appropriate for restrictions on domestic animals. It would apply when the animals are demonstrable risk to the assets.

The Department acknowledges the validity in submissions that believe the Minister should have the right to close a strip for conservation reason. Strips will be conservation areas and can therefore be closed under s.13 of the Conservation Act 1987. The Department accepts submissions that the Director-General's consent to closure of strips should be required. The committee may wish to consider an amendment to this effect.

Improvements - s.24G(5)(a)

Submissions referred to the Land Act definition of improvement. This definition does not apply to the Conservation Act.

Some submissions believed this definition in conjunction with s.24G(5)(4) enabled managers too much freedom. The manager is required by s 25G(9)(a) to consult the Minister before making or erecting any significant improvement. Under s 24(g)(6) the manager is required to comply with any reasonable requirements of the Minister. The Minister therefore has a channel to control improvements. It is appropriate that improvements be compatible with section 24A (purposes of marginal strips) and section 30 of the principal Act (relating to protection of plants). It is proposed that this section be made subject to those two sections and that the manager must have the Minister's approval to place significant new improvements on the strip.

Compensation s.24I(2)-(6)

> Submission were received questioning the requirement for compensation to be paid when the Crown resumes management of a strip. The Department strongly believes that compensation should be payable for improvement currently existing on a strip or improvements which end up on a strip as a result of any movement of a strip. No change is proposed.

Damage done by Manager of a Marginal Strip

The Bill has no penalties (other than the threat of resumption - s.24I) to deter mis-use of strips by a manager. Some submissions considered a requirement for managers to pay for restoration of a strip damaged by inappropriate use should be considered.

It is proposed that it should be an offence to manage a strip in a way that is contrary to clause 15 (damage a strip).

Fire Control

The Department is the fire authority for all "State Areas" under the Forest and Rural Fires Act. State Area includes a 1.5km fire safety margin around the land actually held by the State. There are thousand of kilometres of strips and this creates a safety margin of about one million hectares. DOC is required to field check and where appropriate to issue burning permits for all controlled burns in the safety margin. An amendment to the

Forest and Rural Fires Act has been proposed to exclude marginal strips from the definition of State Area because the use of resources to issue burning permit adjacent to the marginal strips is not the best use of resources available to the Department.

Electricorp

Electricorp believed that some of its essential operational uses of marginal strips around hydro lakes are not compatible with the some of the purposes of marginal strip outlined in s.24A. The Department considers that essential work such as erosion mitigation can be regarded as an imporvement. If the Minister is given flexibility to choose the manager, Electricorp can be appointed for hydro lakes. The Minister can then approve Electricorp making improvements that are required.

No change is proposed

<u>Schedule to the Bill - Repeal of s.58 of the Land Act</u>

The Bill proposes to repeal s.58 of the Land Act 1948 which makes provision for strips to be reserved when Crown land is disposed off.

It proposes to (s.24(3)) to bring all existing s.58 strips under the Conservation Act 1987. They will therefore be subject to s.24. Of particular concern to many who made submissions is the potential for disposal (when a decision to waive/retain have already been made under the Land Act) and the requirement to appoint the owner of adjoining land as manager of the strip.

Other changes discussed above addressed this issue (sections 24(10), 24C and 24D).

Removal of Clause 15 for consideration under the Resource Management Law Reform (RMLR)

A number of submissions from local and regional authorities considered that the marginal strips clause should be removed from the CLR Bill and be considered under RMLR in conjunction with river bed management low reform and reform of esplanade reserve (strips created under s 289 of the Local Government Act upon sub division of land) provisions.

5.12.12.6 Strips will not be created around hydro lakes as these will not be transferred to Electricorp (ie no disposal will occur). A provision to create strips around these lakes will be required if such strips are considered desirable.

5.12.11.1 The Public Land Coalition provided an example of strips that were re-designated in the past to avoid disposal.

The Department believes that the debate over what is or is a strip should be separate from the legislative process. It believes s.24(3) is wide enough to capture all existing lands that serve the purpose of strip.